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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 511.

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA,

Petitioner,

vs.

SOUTHERN RAILWAY COMPANY, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Fourth Circuit

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TABLE OF CONTENTS.

Opinions Below ---------- 2

Jurisdiction ---------- 2

Statute Involved ---------- 2

Questions Presented ---------- 3

Statement of the Case ---------- 4

Reasons for Granting the Writ ---------- 10

I. The Court below has decided important questions concerning the handling of disputes under the Railway Labor Act in a manner in conflict with the applicable decisions of this Court ---- 10

II. The Court below has decided important questions of Federal law which have not been, but should be, settled by this Court ---------- 14

Conclusion ---------- 17

Appendix:

Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit ---------- 18

Per Curiam Opinion on Petition for Rehearing -- 35

Statutes Involved ---------- 35

CITATIONS.

Cases.

Carey v. Westinghouse Electric Corp., 375 U. S. 261 12

Gunther v. San Diego & Arizona Eastern Railway, 382 U. S. 257 (1965) ----------10, 11, 14

Order of Railway Conductors of America v. Pitney, 326 U. S. 561 (1946) ---------- 11

Transportation-Communication Employees Union v. Union Pacific R. R., 385 U. S. 157 (1966) -- ----------3, 9, 10, 11, 12, 13, 14, 16

Statutes.

28 U. S. C. Sec. 1254(1) ---------- 2

28 U. S. C. Secs. 1331 and 1337 ---------- 2

45 U. S. C. Sec. 151 *et seq.* ---------- 2

45 U. S. C. Sec. 152 (5) ---------- 16

45 U. S. C. Sec. 153, First (i) ---------- 5

45 U. S. C. Sec. 153, First (m) (Prior to amendment June 20, 1966) ---------- 35

45 U. S. C. Sec. 153, First (m) (amended 80 Stat. 209, June 20, 1966) ---------- 36

45 U. S. C. Sec. 153, First (p) (Prior to amendment June 20, 1966) ----------3, 4, 9, 35-36

45 U. S. C. Sec. 153, First (p) (amended 80 Stat. 210, June 20, 1966) ----------3, 4, 9, 17, 37

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SOUTHERN RAILWAY COMPANY, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals for the Fourth Circuit

Brotherhood of Railroad Signalmen of America, petitioner, prays that a writ of certiorari issue to review the judgment entered in these cases[1] by the United States Court of Appeals for the Fourth Circuit on May 1, 1967, petition for rehearing denied June 9, 1967.

[1] There were two cases in the United States District Court. The first case arose from facts developing at High Point, North Carolina; petitioner's appeal in the Court of Appeals was docketed as No. 10,799 and the respondent's cross-appeal as No. 10,800. The second case in the District Court arose at Hayne Car Shop Yard near Spartanburg, South Carolina; petitioner's appeal in the Court of Appeals was docketed as No. 10,801 and the respondent's cross-appeal as No. 10,802. The docket numbers assigned to the two separate complaints in the United States District Court were, respectively, No. C-2-G-65 and No. C-9-G-65. The cases were heard together in the District Court and in the Court of Appeals.

In this petition, page references to the Appendices attached in the Court of Appeals briefs contained in the record are designated R., Appendix I, II, III or IV, p. _____. Otherwise, the record references are shown as R., _____.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Fourth Circuit is not as yet reported; it and the opinion denying the Petition for Rehearing are reproduced at pages 18 to 35 of the Appendix to this Petition. The opinion of the District Court in the *High Point* case is reported at 254 F. Supp. 564 and the opinion in the *Spartanburg* case at 254 F. Supp. 569.

JURISDICTION.

The opinion and judgment of the United States Court of Appeals for the Fourth Circuit were entered May 1, 1967. A Petition for Rehearing was denied on June 9, 1967 (R. pp. 8-25, 44).

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254 (1). The jurisdiction of the United States District Court was based on the Railway Labor Act (45 U. S. C. Sec. 151, *et seq.*), and 28 U. S. C. Sections 1331 and 1337.

STATUTE INVOLVED.

The statute involved is the Railway Labor Act (45 U. S. C. Sections 151, *et seq.*), the pertinent portions of which are printed in the Appendix hereto, page 35, to wit, Section 3, First (m), and Section 3, First (p). The text of these sections is reproduced, before and after their amendment on June 20, 1966.

QUESTIONS PRESENTED.

(1) Must the Federal courts enforce an award of the National Railroad Adjustment Board under Section 3, First (p) of the Railway Labor Act, without remanding the award to the Board, when it conclusively appears that the award settled a dispute between the petitioner railway labor organization and the railroad which was concerned only with a claim for pay for work contracted out by the railroad to an employer outside the railroad industry contrary to the railroad's collective bargaining agreement, under circumstances where the Board did not, in making its award, notify another union which had not made any claim to the work?

(2) Does this Court's holding in *Transportation-Communication Employees Union v. Union Pacific R. R.*, 385 U. S. 157, apply when in fact there is no dispute between railway labor unions over a work assignment, and the award was only concerned with a claim for pay made by railway employees where the work claimed by them was contracted out to a contractor outside the railroad industry contrary to the railroad's collective agreement with their railway labor union?

(3) Must an award of the National Railroad Adjustment Board be enforced by the Federal courts under Section 3, First (p) of the Railway Labor Act where the award settled a dispute between petitioner and a railroad in regard to the work within the scope of petitioner's collective bargaining agreement and the only other union which could be said to be involved in the dispute filed a response with the Board and did not thereafter participate in the Board proceedings?

STATEMENT OF THE CASE.

The case before this Court arose out of two actions filed in the United States District Court, one being referred to as the *High Point* case and the other as the *Spartanburg* case. Both actions were brought by the Brotherhood of Railroad Signalmen, petitioner herein, under Section 3, First (p) (45 U. S. C. Section 153 First (p)) of the Railway Labor Act, to enforce in each instance a separate award of the National Railroad Adjustment Board, Third Division. The judgments of the District Court, separately appealed by both petitioner and respondent, were disposed of by identical judgments and a single opinion of the Court of Appeals.

Petitioner is the bargaining representative under the Railway Labor Act of the craft of signalmen, signal maintainers, and signal helpers employed by respondent, Southern Railway Company. There was in effect in 1956 and thereafter a collective bargaining agreement between petitioner and the respondent railroad which covers the rules, rates of pay, hours of service, and working conditions of the employees of respondent in the craft represented by petitioner. The bargaining agreement contains provisions in regard to the scope of the agreement. Rule 1 (R., Appendix I, p. 3a.) This rule, commonly called the Scope Rule, defines the work to be performed by employees in the craft of signalmen, and further places restrictions upon the contracting out or assignment of signal work to persons outside the craft of employees represented by petitioner. In addition, Rule 2 of the bargaining agreement specifies the type and classification of the work positions in the signalmen's craft (R., Appendix I, p. 5a).

High Point Case. On July 1, 1957, the respondent, in violation of the collective bargaining agrement, contracted

with an outside contractor (not in any way connected with the railroad) for installation of replacement poles in an electrical transmission line at High Point, N. C. Three employees of the outside contractor, who were not members of the signalmen's craft of employees of respondent railroad, spent three hours installing the poles (R., Appendix I, p. 6a).

The petitioner on behalf of named individuals who were employed in the signalmen's craft at High Point, N. C., filed claims with the respondent for 8 hours pay for each employee. The claims asserted that the signalmen were entitled to perform the work of installing the poles and that respondent had violated its collective bargaining agreement by employing an outside contractor for that purpose. Respondent railroad refused payment. Petitioner thereupon submitted the claims to the National Railroad Adjustment Board, Third Division, for arbitration of such disputes under Section 3, First (i) (45 U. S. C. Section 153, First (i)) of the Railway Labor Act.

On September 26, 1963, the Board rendered its Award No. 11733, finding that respondent had violated its bargaining agreement with petitioner. The Board also found that the named employees of respondent, who should have performed the work, were each entitled to three hours pay at straight time rates (R., Appendix I, p. 6a).

An order was entered by the Board directing respondent to comply with the award on or before December 1, 1963 (R., Appendix I, p. 7a). Respondent refused to comply with the award and order. The three signalmen employees who would have been entitled to perform the work in High Point on July 1, 1957, under the award of the Board, are stipulated by the parties as C. J. Dorminey, J. J. Cartee, and E. M. Suthard. On December 28, 1965, J. J. Cartee informed petitioner that he had no further

interest in the claim and petitioner withdrew the portion of the claim involving him. On July 1, 1957, C. J. Dorminey was employed by defendant as a signalman with an hourly rate of pay of $2.296. On July 1, 1957, E. M. Suthard was employed by respondent as an assistant signalman, and the hourly rate of pay for that position on the above date was $2.188. On July 1, 1957, both Dorminey and Suthard worked 8 hours for Southern Railway on signalmen's work at a derailment near Charlotte, North Carolina, and were paid their regular rate of pay for such work (R., Appendix I, p. 11a).

In its Opinion in connection with Award No. 11733, (R., Appendix I, p. 1a) the Adjustment Board found that at issue was the question of the railroad's contracting out work. (R., Appendix I, p. 2a.) The Board also considered the contention of the railroad that it did not violate the signalmen's agreement in contracting out this work since the work could also have been performed by the railroad's employees in the craft of electricians.

The Board considered applicable provisions of the electricians' agreement cited to it by respondent railroad. The Board found that while no complaint was filed by the electricians against the contracting out of this work, the petitioner did protest. (R., Appendix I, p. 4a.) The Board did not regard the electricians involved in the dispute as necessary parties before the Board.

There has been no controversy whatever between the electricians employed by respondent railroad and its signalmen as to which of the two crafts was entitled to the work. No dispute, jurisdictional or otherwise, between crafts of organizations in the railway industry is involved in this case. The question before the Board was whether respondent could validly contract out the particular work.

Despite this, the Court of Appeals would remand the case to the Adjustment Board for the purpose of deciding a dispute between unions which dispute, in our opinion, is in fact non-existent.

Spartanburg Case. In 1956 respondent constructed and installed at its Hayne Car Shop Yard near Spartanburg, S. C., electrically operated retarding devices and equipment to hold cars.

On occasion respondent permitted employees other than those covered by the Signalmen's agreement to perform signal work on these car retarders. Petitioner, on behalf of named individuals who were employed in the signalmen's craft at or near Spartanburg, filed pay claims with respondent. The claims asserted that the signalmen were entitled to perform the work of maintaining the car retarder system at Hayne Car Shop and that respondent had violated the signalmen's bargaining agreement by requiring or permitting employees other than signalmen to perform said work. Respondent railroad refused to pay the claims. Petitioner thereupon submitted the dispute to the National Railroad Adjustment Board, Third Division. On March 2, 1964, the Board rendered its Award No. 12300, finding that respondent had violated the collective bargaining agreement by having the signal work performed at Hayne Car Shop Yard by employees outside the craft of signalmen, signal maintainers, and signal helpers. The Board ordered respondent to pay each of the named signalmen employees whom it found were entitled to the work (R., Appendix III, p. 4a).

An order was entered by the Board directing respondent to comply with the award on or before May 16, 1964 (R., Appendix III, p. 5a). Respondent refused to comply with the award and order.

The two employees who would have been entitled to perform the work at Spartanburg, S. C., from October 18, 1956, to their respective dates of retirement, were J. F. Shinta, signal maintainer, and W. K. Day, assistant signal maintainer. J. F. Shinta retired on June 6, 1960, and W. K. Day retired on July 2, 1960. The claim of petitioner was limited to the period from October 18, 1956, to the respective dates of retirement. The effective hourly rate for Mr. Shinta and Mr. Day was stipulated as being $2.158. Respondent kept no record of the maintenance work done on the car retarder system, but estimated that one man hour of such work was done each month (R., Appendix III, p. 9a).

Enforcement Actions. Since respondent, Southern Railway Company, refused to comply in whole or in part with the Adjustment Board's awards and orders, separate suits seeking enforcement of those awards and orders were filed by petitioner in the United States District Court for the Middle District of North Carolina.

The cases were tried without a jury and were submitted on the pleadings, stipulations, and other evidence, including exhibits, and briefs. On May 25, 1966, the District Court entered its findings of fact and conclusions of law and opinions (R., Appendix I, p. 9a; R., Appendix III, p. 7a).

The District Court declined to enter a categorical order of enforcement of the awards. It concluded that recovery for the individual employees on the monetary portions of the awards was governed by the common law of contracts relative to damages. It found that the individual employee claimants had not suffered any actual monetary loss from respondent's violations of the bargaining agreement and were entitled to nominal damages only.

On June 8, 1966, the District Court entered its judgment decreeing that petitioner recover in each case nominal damages from respondent in the sum of $1.00, and that the costs incurred include $25.00 as reasonable attorneys' fees pursuant to Section 3, First (p) of the Railway Labor Act. (45 U. S. C. 153, First (p).)

The Court of Appeals reversed the holding of the trial court in respect of allowing the petitioner only nominal damages and attorneys' fees. The Court of Appeals further held that it must consider the possible effect of this Court's decision in *Transportation-Communication Employees Union v. Union Pacific R. R.*, 385 U. S. 157, decided December 5, 1966, shortly before this case was argued in the Court of Appeals on January 12, 1967. The Court of Appeals stated that case "imposes on the Board the obligation fully to settle jurisdictional disputes in a single proceeding."

The judgments of the District Court were vacated and the cases remanded with directions that they be returned to the Board for further proceedings consistent with the opinion. On rehearing the Court of Appeals stated that:

> "The court is of the opinion that the petition for rehearing should be denied. While Petitioner's contention that the original awards fully resolved the disputes may have merit, the National Railroad Adjustment Board is the appropriate forum in which the Petitioner should seek clarification of the awards. The Board should have the opportunity to reconsider and amplify the awards in light of *Transportation-Communication Employees Union v. Union Pacific R. R.*, 385 U. S. 157 (1966), which was not decided when the awards were made."

REASONS FOR GRANTING THE WRIT.

I. The Court below has decided important questions concerning the handling of disputes under the Railway Labor Act in a manner in conflict with the applicable decisions of this Court.

Petitioner in this case submitted to the National Railroad Adjustment Board two disputes arising from claims that the respondent had violated its collective bargaining agreement with petitioner by (1) assigning certain temporary work to which signalmen employees were entitled to an outside contractor not connected with the railroad industry, and (2) by having signal work performed by employees outside the craft of signalmen. The Board resolved these disputes in favor of petitioner. The Court of Appeals held that the disputes should be returned to the Board for clarification of the awards. Ingrained in the opinion of the Court of Appeals is the premise that these cases involve jurisdictional disputes. The Court of Appeals held that the Board should consider and specifically disclose whether or not the mandates of this Court in *Transportation-Communication Employees Union v. Union Pacific R. R.*, 385 U. S. 157, were considered and followed.

The opinion of the Court of Appeals on rehearing, recognizes that "* * * Petitioner's contention that the original awards fully resolved the disputes may have merit * * *." But the Court holds that "* * * the National Railroad Adjustment Board is the appropriate forum in which the Petitioner should seek clarification of the awards."

The decision below is clearly in conflict with the holdings of this Court in *Transportation-Communication, supra,* and in *Gunther v. San Diego & Arizona Eastern Railway,* 382 U. S. 257.

This Court has held that the Adjustment Board's interpretation of the provisions of a collective bargaining agreement cannot be rejected by a federal court unless it can be said that it "was wholly baseless and completely without reason." *Gunther v. San Diego & Arizona Eastern Railway Co.*, at page 261.

This Court has also held that Congress in enacting the Railway Labor Act "intended to leave a minimum of responsibility to the courts." *Order of Railway Conductors of America v. Pitney*, 326 U. S. 561, 566.

In the *Transportation-Communication* case, this Court ordered that a jurisdictional dispute be remanded to the Adjustment Board with directions to resolve the entire dispute, after giving the Clerk's union a chance to be heard, upon consideration not only of the contract between the railroad and the telegraphers, but in light of contracts between the railroad and any other union involved in the over-all dispute. The Court indicated that the Board's order would then be enforceable by the courts.

The Court of Appeals in the instant cause has announced a new rule of law, not to be discovered either expressly or impliedly in the *Transportation- Communication* case, that in a dispute (High Point) which is concerned only with a claim for pay made by railroad employees under a collective bargaining agreement with their employer under circumstances where work to which they claim to be entitled has been performed by an outside contractor unconnected with the railroad industry, that such a case cannot be finally decided by the Adjustment Board without its summoning another union which has not asserted a claim.

In the *High Point* case, Award No.11733, the opinion of the Adjustment Board clearly shows that in the process of arriving at its award the Board considered not only the

Signalmen's collective agreement, but the agreement of the only other union which could have relevancy, to wit, that of the electricians. The Opinion of the Board sets out and considers both the Signalmen's contract and the contract of the electricians, as is recognized in the opinion of the Court of Appeals (R., p.10). The Opinion of the Board specifically notes that the electricians made no claim to the work involved in the dispute which the carrier contracted out (R., Appendix I, p. 4a). It was found in the Opinion that the electricians did not protest the contracting out, but that the Signalmen did.

This Court has held that a jurisdictional dispute (or work assignment dispute) can be of two different, though related, species: either (1) a controversy as to whether certain work should be performed by workers in one bargaining unit or those in another; or (2) a controversy as to which union should represent the employees doing particular work. *Carey v. Westinghouse Electric Corp.*, 375 U. S. 261.

A type of jurisdictional dispute over work assignments was before this Court in the *Transportation-Communication* case where the court also referred to two types of jurisdictional disputes. One type of jurisdictional dispute arises when two or more unions claim the right to perform a job which existed at the time their collective bargaining contracts with the employer were made, and another type exists where two unions claim the right to perform a new job created by technological developments. This Court held that the Adjustment Board should resolve such entire work assignment dispute, giving notice to the other union, and whether or not the other union appears, should resolve the dispute upon consideration of all the union contracts involved in the dispute.

The Court of Appeals has apparently regarded both the *High Point* and *Spartanburg* cases as involving disputed work "negotiated into the contracts of two competing unions." Based upon such considerations, that Court held that the cases must be remanded to the Adjustment Board which is presumably to take into account the contracts of competing unions. The facts of these cases, in our judgment, reveal, however, that the disputes are not work assignment jurisdictional disputes as discussed in the *Carey* and *Transportation-Communication* cases. Especially is this evident in the *High Point* case wherein Award No. 11733 was rendered.

In Award No. 11733 the Board found that petitioner's agreement had been violated one day on July 1, 1957, by respondent's contracting with an outside employer to perform certain signal work. The Board required respondent to make certain payments to three signal employees who had been deprived of the work which had been contracted away. This Court said in *Transportation-Communication* that: "There are two kinds of these jurisdictional disputes. Both are essentially disputes between two competing unions, not merely disputes between an employer and a single union."

In *High Point* the dispute concerned the question as to whether respondent could validly contract with an employer outside the industry for performance of the particular work. The controversy was, hence, between the employer and a single union. This controversy was resolved by the Adjustment Board in favor of petitioner. The dispute so resolved did not basically involve two competing unions or their contracts. We would conclude that there is no occasion now to serve notice upon, or weigh the contract of, a union other than petitioner. Because the fundamental struggle lay between the employer

and the petitioner union alone, we believe that the judgment of the Court below conflicts with this Court's decision in *Transportation-Communication*, and should be reviewed in light of that case and *Gunther*, as well. We would respectfully suggest that *High Point* particularly is so nearly akin in principle to that of *Gunther* as to warrant the granting of certiorari and summary remand with directions to enter an order of enforcement, a judgment for money, and the fixing of attorneys' fees.

The facts in *Spartanburg* do not involve work assignments comprising full employment on a job. That case is concerned with signal maintenance work amounting to approximately one hour a month. Jobs of shop craft workers thus are not affected in what we would regard to be the sense of *Transportation-Communication*.

II. The Court below has decided important questions of Federal law which have not been, but should be, settled by this Court.

Important questions have been decided by the Court below in regard to the operation of the statutory machinery for settlement of minor disputes in the railroad industry and in regard to the effect of awards resulting from operation of that statutory machinery. In *Transportation-Communication* this Court "granted certiorari in order to settle doubts about whether the Adjustment Board must exercise its exclusive jurisdiction to settle disputes like this in a single proceeding with all disputant unions present." (385 U. S. 157, 159) And in the *Gunther* case this Court granted certiorari because the holdings of the lower courts "seemed, in several respects, to run counter to the requirements of the Railway Labor Act as we have construed it." (382 U. S. 257, 260.)

In the *High Point* contracting out case (Award No. 11733) no union or individual lay claim to the work performed, other than petitioner. The Board found as follows (R. Appendix I, 4a): "Here, the work was not given to employees of either group who might have laid claim to it. While no complaint was filed by the Electricians, the Signalmen did protest. There is good reason, therefore, to uphold their claim." . . .

The Opinion of the Board in the *Spartanburg* case (Award No. 12300) noted that "The controlling question is whether the alleged 'Car Retarder System' so installed is a 'Car Retarder System' within the meaning of that term as it is used in the Scope Rule" of the Signalmen's agreement. The Board held:

> "The question as to whether the work of maintaining said 'system' after its installation is 'generally accepted signal work—on Car Retarder Systems', must be answered in the affirmative. We have also concluded that the Shop Craft employees who have been permitted to maintain said 'system' since its installation are not necessary parties to this dispute. *The Organization to which they belong was notified of the pendency of the dispute and filed its response thereto.* Therefore, the question as to the necessity for giving notice is moot."

The "response" of the union of shop craft employees referred to in the quotation above is not a part of the record of this case. Obviously the Board considered it sufficiently comprehensive to dispose of the question of the giving of notice. Absent an affirmative showing to a different effect, we submit that the "response" ought to be regarded as an appearance in the Board's proceedings under the circumstances of this case, and a satisfaction of any requirement there may be for consideration of the

contracts or interests of the shop craft employees which patently could have been presented and asserted as an integral part of the "response."

For reasons discussed *supra* under I in this section of our brief, we do not regard *High Point* as falling within the notice and consideration of contract requirements of the *Transportation-Communication* case. The Court of Appeals would remand these proceedings to the Adjustment Board for reconsideration and amplification of the awards. There may be numerous like cases required to be reheard by the Board if the decision of the Court of Appeals should prevail. A serious question is thus presented concerning the administration of the Railway Labor Act.

The Award in *High Point* was rendered in 1963; that in *Spartanburg* during 1964. The incidents providing the basis of claim in both awards took place many years prior to the dates of the awards. It is within the knowledge of this Court that the processes of the Adjustment Board are slow. Remand entails additional delay in disposition of these claims incompatible with "the prompt and orderly settlement of all disputes," which is one of the general purposes of the Railway Labor Act. (45 U. S. C. Section 152(5)).

This Court has not heretofore directly decided the question whether the Railway Labor Act requires the giving of notice and consideration of contracts under conditions where no jurisdictional dispute exists between competing unions as defined in the prior decisions of this Court. Such a decision would be implicit in the granting of certiorari and remand in *High Point* suggested *supra*. Nor has it decided whether those requirements obtain under conditions where the Board proceedings disclose the

filing of a response such as that received by the Board in the *Spartanburg* case and referred to in the portion of the Board's holding quoted above. We believe these to be important questions of Federal law which should be settled by this Court.

We submit that the Adjustment Board's awards have finally settled these disputes and that the awards are entitled to be enforced pursuant to Section 3, First (p) of the Railway Labor Act without further proceedings before the Board. The manner in which the Court of Appeals has resolved the issues threatens the effectiveness of the Adjustment Board and the enforceability of its awards.

CONCLUSION.

For the foregoing reasons, petitioner prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

SOBELOFF, Circuit Judge:

The Brotherhood of Railroad Signalmen (hereinafter Brotherhood) appeals from the District Court's refusal to enforce in full two awards of the National Railroad Adjustment Board based upon alleged breaches by Southern Railway Company of the collective bargaining agreement in force between the parties. The sums directly involved are small, but intriguing and possibly far reaching questions are raised as to the Board's procedure and the scope of the courts' reviewing authority.[1]

Award No. 11733 (appeal No. 10,799) stems from Southern's unilateral contracting out of work incident to the installation of three replacement poles for an electrical transmission line at High Point, North Carolina. The existing transmission line needed to be raised to permit construction of a new spur track, and this necessitated the installation of taller poles on which to string the line. Southern's position before the Board was that its supervisor received only three days advance notice of the scheduled commencement of the construction, which would require elevation of the line before that date. It asserted that neither an electrical workers' line gang nor a signal gang was available—one or the other of which would ordinarily perform the work—and that it therefore arranged for the vendor of the new poles also to supply the necessary men and machinery and to perform the actual installation.[2] Southern's argument was that, faced

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[1] Compensation in the amount of $92.79 was awarded in No. 10,801, while less than $14.00 was awarded in No. 10,799.

[2] Southern's Signal and Electrical Department is comprised of two distinct crafts, signalmen and electrical workers, both of

with an emergency, its actions did not constitute a breach of the collective bargaining agreement. Brotherhood, on the other hand, contended that a crew of its members

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(Continued from preceding page)

which regularly perform the work of maintaining electrical transmission lines. The signalmen are represented for purposes of collective bargaining by the Brotherhood and the electrical workers are represented by the International Brotherhood of Electrical Workers (I.B.E.W.). The current contracts negotiated by Southern with Brotherhood and with I.B.E.W. recognize that both signalmen and electrical workers have been performing line work and make provision for both to continue doing so. The signalmen's contract provides that

> "Nothing in this Scope Rule 1 or any other provision of this agreement shall be construed to bar the carrier from continuing to assign to Electrical Workers on Lines East work of the character heretofore performed by employees in the so-called IBofEW [sic] line gang on Lines East and such practice may be continued without being an infringement on the rights of employees subject to this agreement; it being agreed that the Electrical Workers in the so-called IBofEW line gang on Lines East, as well as employees covered by this agreement, have been performing both low and high tension line work."

The complementary provision in I.B.E.W.'s contract, quoted in "Carrier's Statement of Facts" before the Board, recognizes that signalmen perform similar work. The pertinent part of the statement is as follows:

> "The work which they [electrical workers] have a right to perform is described in Rules 136 and 137 of that agreement [I.B.E.W. Contract], which, among other things, provides in Rule 137 that:
>
> 'Linemen's work shall consist of the building, repairing and maintaining of pole lines and supports for service wires and cables; * * *.
>
> Signal maintainers who, for fifty percent or more of their time, perform work as defined in Rules 136 and 137.'

Signal employees perform work of the character described in Scope Rule 1 of their agreement and, in addition, are permitted to perform electrical work within the limits prescribed in the second paragraph of Rule 137 of the Electrical Workers' agreement (quoted next above), which includes the building, repairing, and maintaining of pole lines and supports for service wires and cables; '* * * other work properly recognized as linemen's work.' "

capable of installing the poles was working at Charlotte, North Carolina, only 75 or 80 miles away, and could easily have been transferred to High Point in ample time. It does not appear whether I.B.E.W., the electrical workers' representative, was notified of the pendency of the Board proceeding. The Board sustained Brotherhood's position and held that its contract had been violated.

Award No. 12300 (appeal No. 10,801) stems from Southern's assignment of the maintenance of a newly installed electrical "car retarder system" at its Hayne Car Shop Yard near Spartanburg, South Carolina, to employees represented by a union other than Brotherhood. The purpose of the retarder system is to hold cars in place on the tracks outside the repair shop after their emergence from the paint shop, until the repairmen are ready to work on them. The system was installed by an outside contractor, and while Brotherhood initially complained that its members were entitled to both the installation and maintenance work, it limited its formal claim to the latter, conceding that with respect to the installation it was barred by its failure to assert the claim within the 60-day contractual limitations period.

Brotherhood relied on the language of the "Scope Rule" in its contract to the effect that "[s]ignal work shall include * * * generally recognized work on * * * car retarder systems * * *." Southern's view was that maintenance of the retarders was not "generally recognized signal work" because that phrase historically refers to the more elaborate mechanisms used in large railroad yards to classify cars, and not to the equipment here involved, which it asserted was physically located entirely within the "[repair] shop limits and fall[s] within the Scope Rule of the Shop Crafts Agreement." Rejecting this argument, the Board stated that "the Rule [scope rule in

Brotherhood contract] contains no language limiting or restricting 'Car Retarder Systems' with respect to their size, their location or the purpose for which they must or may be used." The Board also held that the union to which the Shop Craft employees belong, which had been notified of the pendency of the Board proceedings but chose not to appear, was not a necessary party to the dispute.[3]

By the terms of both awards (Nos. 11733 and 12300, our appeals 10,799 and 10,801), Southern was ordered to compensate certain members of the complaining Brotherhood in the amount that would have been earned had the members been permitted to install the transmission line poles and maintain the retarders from the date of installation. The railroad was further ordered to restore to signalmen the maintenance work incident to operation of the retarders. Upon Southern's refusal to comply with the awards, the Brotherhood instituted enforcement proceedings in the District Court under section 3, First (p) of the Railway Labor Act, 45 U. S. C. A. § 153, First (p) (1954).

The District Court agreed that the railroad violated the contract in both instances, but declined to enforce the awards of damages as determined by the Board, and limited the allowance to nominal damages of $1.00 in each case. The court reasoned that since the employees designated by Brotherhood to receive the monetary awards had been fully employed at all relevant times, they were not entitled to any remuneration for lost work. In the exer-

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[3] Apparently, the notice and response thereto were in a form antedating the Supreme Court's decision in *Transportation-Communication Employees Union v. Union Pacific R.R.*, 385 U.S. 157 (1966), and adverted to therein. *Id.* at 159 n.2. The response specifically reserved the right of the non-petitioning Shop Craft employees' union to institute separate proceedings if the Board's decision adversely affected its members' jobs.

cise of its authority under section 3, First (p) of the Act, the court awarded Brotherhood legal fees of $25.00 in each case.[4] On appeal to this court, Brotherhood contends that the monetary awards should have been enforced in full and that the allowance of only $25.00 counsel fees in each case was inadequate and unreasonable.[5]

On June 20, 1966, twelve days after the District Court entered judgments in these cases, there became effective certain amendments to the Railway Labor Act restating and further restricting the scope of judicial review of Board awards.[6] Brotherhood urges the applicability of these amendments to pending appeals, but the

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[4] Section 3, First (p), 45 U.S.C.A. § 153, First (p) (1954), provides that "[i]f the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee * * *."

[5] Southern filed two cross-appeals, Nos. 10,800 and 10,802, claiming that it was entitled to trials *de novo* in the District Court on the question whether it violated the collective bargaining agreement in the two cases. Before oral argument in this court, however, Southern decided not to pursue the cross-appeals. See *Gunther v. San Diego & Arizona Eastern Ry.*, 382 U.S. 257 (1965).

[6] Section 3, First (p) of the Act, 45 U.S.C.A. § 153, First (p) (1954), which prior to amendment read in pertinent part that a Board order "shall be prima facie evidence of the facts therein stated," was amended to read that "the findings and order of the * * * Board shall be conclusive on the parties."

Section 3, First (m) of the Act, 45 U.S.C.A. § 153, First (m) (1954), which prior to amendment read in pertinent part that "awards shall be final and binding on both parties to the dispute, except so far as they shall contain a money award," was amended by deletion of the words "except so far as they shall contain a money award."

The only other amendment relevant to the present appeals was the addition to § 3, First (p) of a proviso that Board orders

> may not be set aside except for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

view we take of the cases makes it unnecessary to resolve this question.[7]

I.

On their face, the present appeals raise solely a legal question as to the scope of judicial review of Board awards. However, we must first consider the possible effect of the Supreme Court's recent decision in *Transportation-Communication Employees Union v. Union Pacific R.R.*, 385 U. S. 157 (1966), which imposes on the Board the obligation fully to settle jurisdictional disputes in a single proceeding.[8]

In *Transportation-Communication*, the railroad installed IBM machines to perform dual functions previously assigned separately to clerks and to telegraphers. Operation of the machines was assigned to the clerks, and the telegraphers' union protested, claiming the jobs for its members. The dispute eventually reached the Board. Although the clerks' union was notified of the pendency of the case, it declined to participate, indicating an intention to institute separate proceedings if the jobs of any of its members should be threatened.[9] The Board determined that the telegraphers were entitled to operate the ma-

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[7] In *Brotherhood of Railroad Trainmen v. Denver & Rio Grande Western R.R.*, ____ F.2d ____ (Dec. 28, 1966), the Tenth Circuit held that the amendments do apply to cases pending on appeal on June 20, 1966 and, despite their according finality to a Board award of money damages, do not infringe the Seventh Amendment right to a jury trial.

[8] *Transportation-Communication* was decided after the District Court rendered its decisions in these cases and after briefs were filed in our court. Although the decision was available shortly before oral argument of the appeals, it was not alluded to by counsel for either side. We consider it unnecessary, however, further to delay our decision by requesting a rehearing on the limited question of its applicability to these cases.

[9] See footnote 3, *supra*.

chines under their contract and awarded compensation to telegraphers idled by assignment of the jobs to clerks. It did not consider whether a reasonable construction of the railroad's contract with the clerks' union would support assignment of the jobs to its members. The District Court denied enforcement of the award on the ground that the clerks' union was an indispensable party and the Court of Appeals for the Tenth Circuit, and in turn the Supreme Court, affirmed. The Court reasoned that the Board's failure to bring before it all parties to the dispute amounted to an abdication of its statutory responsibility to settle the "entire dispute." It remanded the case to the Board with directions that the clerks' union once again be given the opportunity to participate

> "and, whether or not the clerks' union accepts this opportunity, to resolve this entire dispute upon consideration not only of the contract between the railroad and the telegraphers, but 'in light of * * * [contracts] between the railroad' and any other union 'involved' in the overall dispute, and upon consideration of 'evidence as to usage, practice and custom' pertinent to all these agreements." 385 U. S. at 165-166. (Citation omitted.)[10]

Although the jurisdictional dispute in *Transportation-Communication* and in appeal No. 10,801 are in some respects distinguishable, we think that the same underlying policy considerations are found in both. The installation of IBM machines in *Transportation-Communication* eliminated two existing jobs and created a new one incorporating the functions of both, yet different from each. The question of the operation of the new machines was not

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[10] It is noteworthy that in the future a competing union will be more likely to enter an appearance, for it will undoubtedly be precluded from instituting separate proceedings once the "entire dispute" has been finally settled.

foreseen and was therefore not covered by any express language in the contract with either union. Viewing the function of the machines, each craft had a tenable claim to their operation based upon the general scope of its contract with the railroad. In appeal No. 10,801, however, the car retarders eliminated no jobs and the Board indicated that additional work was created of a type similar to, if not functionally identical with, that traditionally performed by signalmen. While Southern insisted that retarders do not serve the same purpose in a repair yard as in a classification yard, the Board noted that the scope rule of the Brotherhood contract admits of no such distinction. The internal structure and functioning of the retarders is the same whether they stop and hold cars in place in the repair yard, or merely retard their movement in a classification yard.

The factual variance between *Transportation-Communication* and appeal No. 10,801 might arguably call into play the distinction to which the Court adverted in *Transportation-Communication* between the creation of a totally new job and

> "[t]he ordinary jurisdictional dispute [which] arises when two or more unions claim the right to perform a job which existed at the time the collective contract with the employer was made. In such a situation it would be highly unlikely that each contract could be construed as giving each union the right to be paid for the single job." 385 U. S. at 161.

The point is not free from doubt. On balance, we are more disposed to the view that the installation of car retarders in the repair shop yard may present a sufficiently novel set of circumstances to warrant application of the rule in *Transportation-Communication*. True, the IBM machines were an innovation, while car retarders have

long been in use. Yet it is not implausible that the retarders may have replaced some older, mechanical device operated by repair shop empoyees to hold the cars in position. There may be other relevant circumstances not apparent to judges, yet not spelled out in the record because they are so well known to the Board and others familiar with the industry practices. It is precisely this uncertainty as to the preexisting factual context that suggests the desirability of applying *Transportation-Communication*, which had not been decided when No. 10,801 was before the Board.

The record before us, containing only scant reference to the existence of a competing union and referring not at all to its contract, fails to provide an adequate basis for resolution of the "entire dispute." This court cannot with confidence perform its limited reviewing function when it does not clearly appear in the record whether the Board considered the contract of the competing union.[11] The Supreme Court in *Transportation-Communication* has made known its view that that union's failure to complain will not be deemed sufficient reason for disregarding its contract.

We do not, however, intimate that on remand the Board's decision must be other than it was. We hold only that until the record discloses whether the Board has taken into account the competing union's contract, it cannot be said that the mandate of *Transportation-Communication* has been complied with.

We are further of the opinion that appeal No. 10,799 also is governed by the rule of *Transportation-Communication*. As noted above, work of the type contracted out was negotiated into the agreements of both Brotherhood

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[11] But see *Transportation-Communication*, 385 U.S. at 173-174. (Fortas, J., dissenting).

and I.B.E.W., but, because of the latter's failure to complain, the Board expressly refrained from deciding whether, in a dispute between the two unions, I.B.E.W. would be entitled to the work. The Board stated that:

> These arguments [of Southern that it had not violated Brotherhood's agreement because work of the type contracted out did not belong exclusively to Brotherhood] in our estimation, would have more validity if Management had actually assigned the task in question to Carrier-employed Electricians rather than to outsiders. Assuming that, pursuant to the two applicable agreements and past practice, the work had been given to Electricians, there might well be grounds for arguing that the Signalmen's Agreement had not been abridged. But this is not the situation confronting us. Here, the work was not given to employees of either group who might have laid claim to it. While no complaint was filed by the Electricians, the Signalmen did protest. There is good reason, therefore, to uphold their claim.

This language indicates that the Board, itself, recognized an uncertainty as to which union could assert a right to perform the disputed work or whether, by virtue of the collective agreements and past practice, Southern could unilaterally assign the work to either union, but not to an outsider. It is, of course, possible that on account of a contractual limitations period, I.B.E.W.'s failure to complain precludes it from now asserting a claim to the work. This, however, can be determined only on remand.[12]

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[12] In *Transportation-Communication,* the Board's award decided only that the telegraphers were entitled to be paid for the job, and did not require that they actually be allowed to perform it. It is thus difficult to imagine how the clerks could have been prejudiced since, if they continue to operate the machines, they certainly would be paid. Presumably, however, the railroad, not wishing to support idle telegraphers, might reassign operation of the machines to them, and the clerks would

We do not read *Transportation-Communication* as limited to instances where a totally new job is created that combines the functions of two existing, independent jobs—a development unforeseen when the collective agreements were negotiated. The aim of that decision is to avoid the dilemma which Justice Black points out may arise when an adjudication is made affecting a party not present and whose rights are not considered. The dilemma is not avoided—indeed, the risk of its arising is heightened—when, as in appeal No. 10,799, the disputed work is negotiated into the contracts of two competing unions. Similarly, it seems to make little difference whether the job is characterized as "new" or "old" or whether it entails continuing work or only the perform-

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(Continued from preceding page)

have a legitimate grievance. The clerks' union might then institute separate proceedings before the Board, which, upon consideration of its contract, might award its members compensation and/or the job. If the railroad then refused to pay the telegraphers, claiming that it should not be required to pay two employees to perform a single job, further proceedings might be required to resolve the "entire dispute."

In No. 10,801, the award not only ordered compensation to the signalmen, but also required restoration of the maintenance work to them. The situation is thus different from that in *Transportation-Communication*. However, if Southern now refuses to pay Shop Craft employees for this work, the same type of "merry-go-round," 385 U.S. at 162, envisioned in *Transportation-Communication* will ensue. Not until the claims of all competing unions are considered can the "entire dispute" be finally resolved, for only then are the non-participating unions bound as if they "had lost in a multi-lateral *in rem* proceeding." 385 U.S. at 168. (Stewart, J., concurring).

In No. 10,799, the dispute involved only the performance of an isolated job, not the assignment of continuing work. There was thus no reason for the award to look to the future. However, it is not unlikely that I.B.E.W., which has until now remained silent, will decide that if, as the Board held, Southern had no right to contract out the installation job, I.B.E.W. members should be compensated for that work. Once again, additional proceedings may be required before the "entire dispute" can be resolved.

ance of an isolated task.[13] While the unusual facts of *Transportation-Communication* on their face suggest that both telegraphers and clerks had a possible claim to be paid for operation of the machines, on the state of the records before us we cannot say that either of the instant appeals presents a qualitatively different set of circumstances militating against the application of *Transportation-Communication*.

II.

Since the cases must be remanded to the Board, we are not in position to foresee whether the ultimate awards will be in Brotherhood's favor. If, however, after full consideration of all relevant materials, as required by this opinion, Brotherhood prevails and the matter again comes before the District Court for enforcement, we are of the opinion that the monetary portions of the awards, as well as the Board's determinations on the merits, must be enforced.

The reasoning of the Supreme Court in *Gunther v. San Diego & Arizona Eastern Ry.*, 382 U. S. 257 (1965), decided prior to the enactment of the recent amendments,[14] furnishes the controlling guidelines. There the union sought enforcement of a Board award directing

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[13] In both appeals there may be industry practices concerning the sharing of work between competing unions or suggesting other accommodations. We note the discussions, seemingly in conflict, in the majority and dissenting opinions of Justices Black and Fortas in *Transportation-Communications* with respect to the possibility that each competing union may be entitled to compensation for the disputed work. 385 U.S. at 161-162, 180-181. However, the records in both cases furnish insufficient facts to enable this court to determine whether any such issue exists, and if it does exist, within what latitude it should be met by the Board. On remand, the Board should accordingly amplify the records so that, if required, an informed judgment may be made.

[14] See note 6, *supra*, and accompanying text.

reinstatement with back pay of a discharged employee. The District Court and the Court of Appeals denied enforcement, relying on their own interpretation of the provisions of the collective bargaining agreement. Reversing, the Supreme Court held that "Congress intended minor grievances of railroad workers to be decided finally by the Railroad Adjustment Board," 382 U. S. at 263, and that "it cannot be said that the Board's interpretation [of the collective bargaining agreement] was wholly baseless and completely without reason." *Id.* at 261. Turning to the monetary portion of the award, the Court ruled that district courts "may determine * * * how much time has been lost by reason of the wrongful removal * * *" and compute "the size of the * * * award." *Id.* at 264.

Courts have uniformly held that *Gunther* precludes judicial re-examination of the merits of a Board award.[15] Thus, beyond question, it is not within our province, or that of the District Court, to reappraise the record and determine independently whether Southern violated its obligations under the collective bargaining agreement when it denied Brotherhood members the opportunity to perform the work in question. Southern insists, however, that with respect to the monetary portions of the awards, the District Court acted not in conflict with *Gunther* in limiting Brotherhood to nominal damages on its findings that the records in both cases contain "no evidence of any loss of time, work or pay" by any of the employees who were designated to receive compensation for the lost work. In accepting this contention of Southern, the District

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[15] *E.g., Hanson v. Chesapeake & Ohio Ry.*, 367 F.2d 134 (4th Cir. 1966); *Hodges v. Atlantic Coast Line R.R.*, 363 F.2d 534 (5th Cir. 1966); *Taylor v. Hudson Rapid Tubes Corp.*, 362 F.2d 748 (3d Cir. 1966); *Edwards v. St. Louis-San Francisco Ry.*, 361 F.2d 946 (7th Cir. 1966); *Barrett v. Manufacturers Ry. Co.*, 254 F. Supp. 376 (E.D. Mo. 1966).

Court relied on the common law rule that damages recoverable for breach of an employment contract are limited to compensation for lost earnings. The court reasoned that since *Gunther* permits judicial computation of the size of the monetary awards, it could exercise a discretion to allow Brotherhood nominal damages only where its members lost no time.

This approach, however, completely ignores the loss of opportunities for earnings resulting from the contracting out of work allocated by agreement to Brotherhood members—a deprivation amounting to a tangible loss of work and pay for which the Board is not precluded from granting compensation. Nothing in the record establishes the unavailability of signalmen to perform the work contracted out by the railroad. The vast number of factual possibilities which arise in the field of labor relations, and which must be considered by the Board in cases of this kind, clearly reflects the wisdom of the *Gunther* rule.

The practical effect of the District Court's refusal to enforce the monetary portions of the awards is to undermine and, in essence, reverse the Board's resolution of the merits of the controversies. The unequivocal holding of *Gunther* is that courts have no role to perform in determining whether the Act has been violated. The District Court partially recognized the force of this principle by enforcing the awards insofar as they held Southern to have breached the agreement. Yet, if, whenever no direct lay-off of a union's members is involved, the employer can unilaterally contract out work that has been allocated by agreement to the union, under no greater threat than liability for merely nominal damages, the collective agreement would soon become a worthless scrap of paper. It requires but slight insight into the realities of human behavior to realize that neither party would feel bound

to abide by an agreement that will not be effectively enforced in the courts.

We cannot disregard the Supreme Court's animadversion expressed in *Gunther* against "paying strict attention only to the bare words of the contract and invoking old common-law rules for the interpretation of private employment contracts * * *." 382 U. S. at 261. Were we to approve the District Court's resort to common-law principles governing breach of contract damages, we would be derelict in our unquestionable duty fully to enforce the Board's determination on the merits. The Supreme Court, in another context, has only recently strongly reiterated that "[a] collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it to be governed by the same old common-law concepts which control such private contracts." *Transportation-Communication, supra*, at 160-161.

We have dwelt at great length in parts I and II of this opinion on the impact of *Transportation-Communication* and the implications in *Gunther* for our obligation to defer to Board expertise. We have done so because in our view the Supreme Court's ruling that "minor" disputes should be entirely resolved in a single Board proceeding stems, at least in part, from its insistence, emphasized in *Gunther*, that the Board is the final arbiter of such disputes. Being final, it may render decision only after thorough consideration of all relevant collective agreements and industry practices. Together, *Gunther* and *Transportation-Communication* reflect a single overreaching theme—that final and binding awards are to be made by industry experts upon full information, subject to a minimum of judicial intervention.

III.

As to Brotherhood's complaint that in allowing attorneys' fees of only $25.00 in each case the District Court abused its discretion, it is fair to the District Court to note that it requested Brotherhood to submit authorities bearing on the criteria for determining the size of attorneys' fees in this type of case. When no enlightenment was forthcoming, the court set the fees at a nominal $25.00, based upon the fact that the claim directly involved was less than $14.00 in No. 10,799 and only $92.79 in No. 10,801.

We think, however, that the court erred in limiting its consideration solely to the sum involved in the instant awards. If Brotherhood prevails on remand and Southern again refuses to comply, necessitating further enforcement proceedings, the court must undertake a more extensive inquiry before awarding fees.

It scarcely requires mention that the significance of a legal precedent is not confined by the amount of money immediately in issue. A party seeking judicial enforcement of a Board award is entitled to reasonable compensation for its attorneys. Here a union has been endeavoring to preserve the integrity of its members' earning opportunities in the performance of work claimed to be allocated to them. If it ultimately succeeds in this effort it should be awarded reasonable fees according to accepted professional standards. Despite the small sum immediately recoverable, the case is important to the parties and they are warranted in making reasonable expenditures in prosecuting or defending.

In determining reasonable attorneys' fees, factors to be taken into account are the importance and complexity of the issue being litigated, the quality of the legal services, and the time required for preparation and court appear-

ances. The standards employed in compensating attorneys for the opposing party in litigating the selfsame issue give some indication of the importance of the case and are a relevant consideration in fixing the fees. This list is not meant to be exhaustive and in any future application for fees, the District Court may consider all factors which its experience suggests as pertinent.

For the reasons stated, the judgments of the District Court are vacated and the cases are remanded with directions that they be returned to the Board for further proceedings consistent with this opinion.

Reversed and Remanded with Instructions.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Nos. 10,799; 10,800; 10,801; and 10,802.

Appeal from the United States District Court for the Middle District of North Carolina.

This cause came on to be heard on the record from the United States District Court for the Middle District of North Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the United States District Court for the Middle District of North Carolina, at Greensboro, with directions that it be returned to the National Railroad Adjustment Board for further proceedings consistent with the opinion of the Court filed herein.

s/ SIMON E. SOBELOFF,
United States Circuit Judge.

Filed: May 1, 1967.

PER CURIAM OPINION ON PETITION FOR REHEARING.

PER CURIAM:

The court is of the opinion that the petition for rehearing should be denied. While Petitioner's contention that the original awards fully resolved the disputes may have merit, the National Railroad Adjustment Board is the appropriate forum in which the Petitioner should seek clarification of the awards. The Board should have the opportunity to reconsider and amplify the awards in light of *Transportation-Communication Employees Union v. Union Pacific R. R.*, 385 U. S. 157 (1966), which was not decided when the awards were made.

If the Petitioner prevails on remand to the Board, it will be entitled to enforcement in the District Court in respect to recovery of reasonable attorneys' fees, whether or not the carrier voluntarily complies with the remainder of the awards. Despite fears voiced by the Petitioner, its claims to reasonable attorneys' fees will thus be preserved.

Rehearing Denied.

STATUTES INVOLVED.

45 U. S. C. § 153, First (m) (Prior to amendment, June 20, 1966):

> "(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute."

45 U. S. C. § 153, First (p) (Prior to amendment, June 20, 1966):

"(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

45 U. S. C. § 153, First (m) (Amended 80 Stat. 209, June 20, 1966):

"The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute."

45 U. S. C. § 153, First (p) (Amended 80 Stat. 210, June 20, 1966):

"(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: Provided, however, That such order may not be set aside except for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order."

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No. 511

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA,
Petitioner,

v.

SOUTHERN RAILWAY COMPANY, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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INDEX

	Page
Opinions Below	1
Questions Presented	2
Statement	2
Reasons for Denying the Writ	7
Conclusion	9

AUTHORITIES

Cases:

Gunther v. *San Diego & Arizona Eastern Ry.*, 382 U.S. 257 .. 8

Transportation-Communication Employees Union v. *Union Pacific R.R.*, 385 U.S. 157 .....2, 3, 7 *et seq.*

Statute:

Railway Labor Act, 45 U.S.C., § 153 First (j) .....3, 4, n. 1

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit, and the subsequent opinion on Petition for Rehearing, which have not been reported to date, are printed at pages 18-34, and page 35, respectively, of the Appendix to the Petition. The opinions of the

United States District Court for the Middle District of North Carolina are reported at 254 F. Supp. 564 and 254 F. Supp. 569.

QUESTIONS PRESENTED

Did the court below err in remanding two disputes to the National Railroad Adjustment Board for further consideration in the light of the subsequent decision of this Court in *Transportation-Communication Employees Union* v. *Union Pacific R.R.*, 385 U.S. 157, where:

(1) in the first case a "response" (which does not appear in the record) was filed by a competing union in a dispute between petitioner and respondent over a work assignment, but where the record does not clearly show that the Board considered the competing union's contract or possible claim.

(2) in the second case another union, which may have a claim to the work, was not notified of the dispute between petitioner and respondent over the assignment of the installation of electrical transmission line poles to an outside contractor;

STATEMENT

This controversy stems from the proceedings on two separate claims made by the Brotherhood of Railroad Signalmen on behalf of several of its members against the Southern Railway Company. The awards of the Railroad Adjustment Board, Third Division, were reviewed consecutively by the District Court. The decisions of that court were reviewed concurrently by the Court of Appeals which ordered that both claims be remanded to the Board for reconsideration

in light of *Transportation-Communication Employees Union* v. *Union Pacific R.R.*, 385 U.S. 157.

1. *The Spartanburg claim.* In early 1956, Southern installed an electricial "car-retarder system" to hold cars in place on the tracks adjacent to the repair facilities at its Hayne Car Shop yard in the suburbs of Spartanburg, South Carolina. Maintenance of this system was assigned to car shop employees, members of a Shop Craft employees union. On learning of this maintenance assignment, petition filed a claim with respondent on behalf of the two signalmen employed at or near Spartanburg asserting that the signalmen were entitled to perform the work of maintaining the car-retarder system and that respondent had violated the signalmen's collective bargaining agreement by permitting employees other than signalmen to perform such maintenance. The resultant dispute was eventually submitted to the National Railroad Adjustment Board, Third Division. In support of its claim, petitioner relied on the language of the "Scope Rule" in its contract to the effect that "[S]ignal work shall include . . . generally recognized work on . . . car-retarder systems . . ." (Pet. p. 20). Respondent on the other hand, contended that the contractual phrase "generally recognized signal work" referred only to the more elaborate mechanisms used in classification yards and not to the limited equipment installed within the Car Shop yard limits. In addition, respondent pointed out that since the requested assignment of the maintenance work to the signalmen would displace Shop Craft employees, the Shop Craft employees union was "involved" in the dispute within the meaning of Section 3 First (j) of the Railway Labor Act, 45 U.S.C. § 153 First (j) and thus a prerequisite to the exercise

of the Board's jurisdiction was formal notification to the Shop Craft employees union of the Board's proceedings (Pet. p. 20).[1]

The Board's decision in favor of petitioner notes that the "[S]cope Rule contains no language limiting or restricting 'car-retarder system' with respect to their size, their location, or the purpose for which they must or may be used" (R. Appendix III, p. 3a). Consequently, the Board concluded, the maintenance of the car-retarder system was "generally accepted signal work" on "car-retarder systems" within the meaning of the Scope Rule of the Signalmen's collective bargaining agreement (*Ibid.*). "We have also concluded," the Board's opinion continues, "that the Shop Craft employees who have been permitted to maintain said 'system' since its installation are not necessarily parties to the dispute. The organization to which they belong was notified of the pendency of the dispute and filed its response thereto. Therefore, the question as to the necessity for giving notice is moot" (*Ibid.*). The Board's award requires respondent to compensate the two Spartanburg signalmen for work performed by the Shop Craft employees on the car-retarders at the Hayne Car Shop since October 18, 1956,[2] and to assign the disputed maintenance work to the signalmen (R. Appendix III, p. 4a).

2. *The High Point Claim.* On June 28, 1957, respondent's Signal and Electrical Department learned

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[1] Section 3 First (j) of the Railway Labor Act, 45 U.S.C. § 153 First (j), requires the Adjustment Board to "give due notice of all hearings to the employee or employees and the carrier or carriers involved in any dispute submitted to them."

[2] In the course of the subsequent enforcement proceeding, the parties stipulated that the amount in controversy totaled $92.79 (Pet. p. 20, n.1).

that construction of a new spur track in the High Point, N. C., area was to begin on July 1, with the consequence that nearby transmission lines would have to be elevated promptly The emergency assignment of the installation of three longer transmission line poles to the L. W. Routh Construction Co. resulted in petitioner's claim that the work performed by construction company personnel in installing the transmission poles on July 1 should have been performed by signalmen in accordance with the "Scope Rule" of the Signalmen's agreement. In the course of the resultant proceedings before the Railroad Adjustment Board, Third Division, in which petitioner sought payment to signalmen for the work performed by the outside construction workers, respondent contended that the Scope Rule of the Signalmen's agreement did not prohibit it from assigning the work of installation of transmission poles to personnel other than signalmen; in support of this contention, respondent pointed out that Rule 137 of the International Brotherhood of Electrical Workers Agreement specifically defines linesmen's work as consisting "of the building, repairing and maintaining of pole lines and supports for service wires and cables . . . ,"[3] and that electricians operating under this I.B.E.W. contract, had worked on transmission line poles in the past (R. Appendix I, pp. 1a-4a).

In its opinion sustaining petitioner's claim, the Board wrote: "These arguments, in our estimation,

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[3] Rule 137 provides in pertinent part:

"Linemen's work shall consist of the building, repairing and maintaining of pole lines and supports for service wires and cables; . . . all outside wiring in yards, and other work properly recognized as linemen's work not provided for in Rule 136."

would have more validity if management had actually assigned the task in question to carrier-employed Electricians rather than to outsiders." The opinion continues:

> "Assuming that, pursuant to the two applicable agreements and past practice, the work had been given to electricians, there might well be grounds for arguing that the signalmen's agreement had not been abridged. But this is not the situation confronting us. Here, the work was not given to employees of either group who might have laid claim to it. While no complaint was filed by the electricians, the signalmen did protest. There is good reason, therefore, to uphold their claim." (R. Appendix I, p. 4a.)

The award requires respondent to pay three signalmen wages for three hours of work (R. Appendix I, page 6a).

Petitioner instituted enforcement proceedings in the District Court in January 1965, pursuant to Section 3, First (p) of the Railway Labor Act, 45 U.S.C. § 153, First (p). That court accepted the Board's findings that respondent had violated the collective bargaining agreement, but limited recovery in each case to nominal damages of one dollar and the costs of the action because none of the complaining signalmen had been deprived of work due to the violations, and fixed "reasonable attorneys' fees" at $25.00 for each case (R. Appendix I, pp. 14a-17a; R. Appendix III, pp. 13a-15a).

On appeal by petitioner[4] the court below held that the District Court had erred in awarding only nominal damages and attorneys' fees, but vacated the District

[4] Cross-appeals by respondent were abandoned prior to oral argument.

Court's judgment and ordered the cases remanded to the Board for proceedings in accordance with this Court's decision in *Transportation-Communication Employees Union* v. *Union Pacific R.R.*, 385 U.S. 157. In its opinion on petitions for rehearing, the court acknowledged the possible merit of the Brotherhood's contention that the original awards had fully resolved the entire disputes, but held that the Board "is the appropriate forum in which the petitioner should seek clarification of the award. The Board should have the opportunity to reconsider and amplify the awards in light of *Transportation-Communication Employees Union* v. *Union Pacific R.R., supra,* which was not decided when the awards were made" (Pet. p. 35).

REASONS FOR DENYING THE WRIT

In *Transportation-Communication Employees Union* v. *Union Pacific R.R.*, 385 U.S. 157, this Court held, as petitioner has accurately stated, that when a dispute over work assignments arises—as when two or more unions claim the right to perform a job which existed at the time their collective bargaining contract with the employer were made, or when two unions claim the right to perform a new job created by technological developments—the "Adjustment Board should resolve such entire work assignments dispute, giving notice to the other union, and whether or not the other union appears, should resolve the dispute upon consideration of all the union contracts involved in the dispute" (Pet. p. 12).

Both of the disputes involved in the present proceeding were decided by the Board before that decision was announced. The court below, reviewing the record of the Board proceedings, could not satisfy itself that the Board had resolved the "entire work assignment

dispute" in either case. The petition challenges the Court of Appeals' evaluation of the Board's actions, but it fails to present any substantial reason why, in case of serious doubt, it is not appropriate to require the Board to reexamine its decisions in the light of an authoritative intervening decision which clarified the Board's responsibility and modified its prior practices. That judicial resolution of such doubts is inappropriate is evidenced by the records in these cases.

1. In the *High Point* case the Court is asked to decide, on the facts, whether another union, the International Brotherhood of Electrical Workers, is "involved" in the dispute. But, as the court below wrote, "the Board, itself, recognized an uncertainty as to which union could assert a right to perform the disputed work or whether, by virtue of the collective agreements and past practice, Southern could unilaterally assign the work to either union, but not to an outsider" (Pet., p. 28). Whether the Electricians have a proper claim to compensation for the improper contracting out, or whether such a claim is now barred by time, are questions which cannot be answered on the basis of the incomplete record compiled prior to the *Transportation-Communication* decision. Moreover, these questions are peculiarly within the special domain of the Board, and for the court below to have undertaken to decide them would have been directly contrary to this Court's decision in *Gunther* v. *San Diego & Arizona Eastern Ry.*, 382 U.S. 257.[5]

[5] Petitioner's suggestion that the High Point dispute is directly controlled by Gunther (Pet. p. 14) presupposes that the Board found that the International Brotherhood of Electrical Workers is not "involved" in the dispute. But the very reason for the remand was the absence of any indication that the Board had actually made such a factual determination.

2. In the *Spartanburg* case, as in the *Transportation-Communication* case, the Board directed the carrier to assign work to petitioner's members rather than to the Shop Craft union to which respondent had assigned it. As in that case, the Shop Craft union had filed a "response" with the Board. The response does not appear in the record, but the court below assumed that it was in the form used in the *Transportation-Communication* case (see 385 U.S. at 159, n. 2), reserving the right to institute separate proceedings if the Board's decision adversely affected its members' jobs (Pet. p. 21, n. 3). There is nothing in the Board's conclusion that since the response was filed, "the question as to the necessity for giving notice is moot" (R. Appendix III, p. 3a), which warrants the conclusion that the Board was intending to decide "the entire work assignment dispute"; indeed, there is no reason to believe that the Board did not accept the reservation of rights by the Shop Craft union, just as it had done in the *Transportation-Communication* case. In any event, it would clearly have been wrong for the court below to enter the exclusive domain of the Board to hold, as this Court is now asked to do, that a "response," the text of which is unknown, satisfied the requirements of the Act that the Board had resolved the entire dispute.

CONCLUSION

The issues which this Court is asked to decide in these cases—the degree of involvement of the Electricians in the *High Point* case, and the significance of the "response" of the Shop Craft union in the *Spartanburg* case—are peculiarly within the exclusive domain of the Railroad Adjustment Board, and were properly remanded to that Board for its consideration

in the light of the intervening decisions of this Court. They are issues, moreover, which are limited in significance to these particular disputes. The petition for certiorari should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 511.

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA,
Petitioner,

vs.

SOUTHERN RAILWAY COMPANY,
a corporation,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

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TABLE OF CONTENTS.

I. Contracting-out Work to Independent Contractor Does Not Constitute Jurisdictional Dispute as Defined by Transportation-Communication Employees Union v. Union Pacific R. R., 385 U. S. 157 ---------- 1

II. Failure of Shop Craft Union, in Spartanburg Case, to Assert Claim After Notice From Board Should Be Deemed an Estoppel ---------- 2

III. Conclusion ---------- 3

CITATIONS.

Case.

Transportation-Communication Employees Union v. Union Pacific R. R., 385 U. S. 157 ---------- 1, 2, 3

Statute.

Railway Labor Act, 45 U. S. C. Sec. 153 First (j) -- 2

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REPLY BRIEF OF PETITIONER.

I. CONTRACTING-OUT WORK TO INDEPENDENT CONTRACTOR DOES NOT CONSTITUTE JURISDICTIONAL DISPUTE AS DEFINED BY TRANSPORTATION-COMMUNICATION EMPLOYEES UNION v. UNION PACIFIC R. R., 385 U. S. 157.

Respondent Southern Railway assumes in its Brief in Opposition that the Adjustment Board should re-examine its awards herein in light of an intervening decision of this Court which it argues is applicable to these matters. This position is based on the assumption that there exists in these cases work assignment disputes with a second union involved and thus the awards should be governed by the *Transportation-Communication* decision.

In the *High Point* case involved herein there is but one union, the petitioner, which has made a claim against the respondent for its having contracted-out work to an independent contractor, rather than to the petitioner. The

dispute involves work assigned to an outsider and not to a competing union. Consequently, this situation clearly falls outside the ambit of the jurisdictional disputes covered in *Transportation-Communication Employees Union v. Union Pacific R. R.*, where the carrier arbitrarily favored one union over another. Hence, the Electricians Union in *High Point* was not "involved" in the dispute between the Signalmen and respondent so as to require its being made a party to either the Board or the enforcement proceedings herein by virtue of Section 3 First (j) of the Railway Labor Act, 45 U. S. C. Sec. 153 First (j). Moreover, the Adjustment Board has given consideration to the Electricians contract with respondent. (R. p. 10.) To remand this dispute to the Adjustment Board would be a futile exercise, since the Board has in fact fully considered all relevant matters and there is no indication that a different result would obtain if the Board again considered this case.

II. FAILURE OF SHOP CRAFT UNION, IN SPARTANBURG CASE, TO ASSERT CLAIM AFTER NOTICE FROM BOARD SHOULD BE DEEMED AN ESTOPPEL.

In *Spartanburg* the respondent assigned the maintenance work on its new electrical car retarder system to employees represented by the Shop Craft Union. In order to comply with the requirements of Section 3 First (j), of the Act, *supra, the Board gave notice to the Shop Craft Union.* Petitioner submits that *once this union had been put on notice of the pendency of the dispute it had the duty of making its claim at the same time as the Signalmen or else subjecting itself to the possibility of being estopped from asserting its claim at a later time.* By failing to assert at the time of the petitioner's complaint whatever claim they may have had to the work assigned to them, they should be held to be estopped from changing their "response" and not now declared as a necessary party to

either the Board proceedings or enforcement action. To so require, as done by the court below, would in fact be forcing a union to make a claim which it has declined of its accord to make. In fact, the Shop Craft Union was not a necessary party to these proceedings since *it voluntarily chose not to become involved.* Its filing a "response" to the notification of the Board should be declared a general appearance sufficient to make the Board's decision res adjudicata as to the Shop Craft Union.

III. CONCLUSION.

Petitioner urges this Court to grant the writ of certiorari in order to declare that its decision in *Transportation-Communication, supra,* was not intended to apply to situations, such as this, where only one union is in fact "involved" in a dispute before the Board and where a union has been notified of the dispute, but has not chosen to assert its claim in response thereto.

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